IN THE MATTER OF MERCHANT MARINER'S DOCUMENTS NO. Z-1225264
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Michael A. SPERLING

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1847

Michael A. SPERLING

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 19 January 1970, an Examiner of the United States Coast Guard at New York, N.Y., revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a cadet engineer on board SS AMERICAN CHARGER under authority of the document above captioned, on 12 August 1968, Appellant wrongfully had in his possession aboard the vessel, at Norfolk Va., a quantity of marijuana, to wit, fourteen cigarettes containing marijuana.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of several Bureau of Customs employees.

In defense, Appellant offered in evidence his own testimony, limited to the question of the voluntary character of his act in turning over to Customs officers fourteen cigarettes containing marijuana.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

FINDINGS OF FACT

On 12 August 1968, Appellant was serving as a cadet engineer on board SS AMERICAN CHARGER and acting under authority of his document while the ship was at Norfolk, Va. I adopt as findings of fact those numbered 1 through 21 made by the Examiner in his decision of 19 January 1970.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

(1) Appellant's constitutional rights under the Fifth Amendment were violated by the use of testimony of officials of the Bureau of Customs;

(2) 46 CFR 137.03-3 (a), calling for mandatory orders of revocation when offenses involving narcotics are found proved under R.S. 4450, is unconstitutional; and

(3) Appellant's "character background" and "work record" render an order of less than revocation appropriate.

APPEARANCE: Scribner, Glanstein & Klein, New York, N.Y., by Joel C. Glanstein, Esq.

OPINION

I

Appellant's first point is that his Fifth Amendment right were violated by the use of testimony of the Customs agents who seized the marijuana. For this, Appellant relies on Miranda v Arizona (1966), 384 U.S. 436. Appellant disagrees with my dictum in Decision on Appeal No. 1779, when I said that "...I agree with the Examiner that these decisions [including Miranda] do not apply to administrative proceedings."

Here I specifically hold that the rule of Miranda v Arizona does not apply in these proceedings because that rule prohibits the use "in criminal trials" of testimony as to statements or admissions unlawfully obtained. 384 U.S. 436, 461. A proceeding under R.S. 4450 and 46 CFR 137 is not a criminal trial. I am not aware of any court decision holding that any statements obtained in violation of the "Miranda" rule are not admissible in any proceedings which are not criminal proceedings. I agree with the National Labor Relations Board which said, in Wilbur J. Allingham(Mary Anne Bakeries), May 4, 1967, 164 NLRB No. 30, 21 Pike and Fischer Administrative Law 2nd 377:

"Unfair labor practice proceedings before the board are not criminal proceedings..."

and denied the applicability of the rule in that case.

II

Still on Appellant's first point, I recognize his statement that "The United States Supreme Court has consistently held that the privilege against self-incrimination applies to all administrative proceedings which would include U.S. Coast Guard disciplinary proceedings." There can be no question that Appellant is correct in asserting, on the strength of In Re Gault (1967), 387 U.S. 1 and Murphy v Waterfront Commission (1964), 378 U.S. 52, that he has the right against self-incrimination in an administrative proceedings under R.S. 4450, 46 U.S.C. 239.

He was accorded that right. He was at least twice advised of his right not to testify and he was not required or compelled in any way to testify in the proceeding. The principle of the "Gault" case and "Murphy" decision was scrupulously adhered to in this case. But Appellant misconceives the true application of the principle to this case. The truth is that Appellant could not be compelled to testify in this case because his testimony might later be used against him "in a criminal prosecution." (Murphy v Waterfront Commission, supra.) There is nothing in any of the cases cited that says that evidence, however obtained, cannot be considered in a proceeding which is not a criminal proceeding.

III

As a variant argument under this same first point, Appellant urges that since he was still, at the time of hearing, amenable to prosecution by either the United States or the State of Virginia, the depositions of the Customs agents should not have been admitted into evidence because, "if one or more of these agents were unavailable due to death or other cause at a later time when there was a criminal proceeding instituted against the respondent by either the United States or Virginia for possession or use of marijuana, the judge sitting in that matter could, in the exercise of his discretion, permit the depositions of any of the Customs agents to be received in evidence...". Appellant cites Smith v U.S., CA 4 (1939) 106 F. 2nd 726.

This is an ingenious attempt, but a fundamentally ill-founded argument.

If an attempt had been made to compel Appellant to testify in this proceeding on the grounds that he was no longer, for one reason or another, amenable to any criminal prosecution, then the fact that he is still amenable to criminal prosecution in some jurisdiction within the United States would be meaningful. Such an attempt was not made.

If, at a date subsequent to this proceeding, an effort might be made to prosecute Appellant criminally in a Federal or Virginia

court, the rule in the "Smith" case would not automatically render the deposition of a deceased or otherwise unavailable Customs agent admissible in that criminal prosecution because the deposition, just as oral testimony, would still be open to attack in the criminal prosecution under the "Miranda" rule.

IV

Another sub-point may be perceived under Appellant's first point. He argues that U.S. v Roussel, D.C. Mass. (1968), 278 F. Supp. 908, cited by the Examiner is not applicable to this case, because it deals only with lawfulness of border searches and seizures and not with use of "Miranda" prohibited statements. This argument overlooks two important points. One is that no statements of Appellant made before the seizure of the marijuana cigarettes was "used against him" in any way to prove the offense of possession of marijuana.

Appellant's statements up to that time had been a denial of possession of any contraband. When the Customs officers specified the kinds of contraband they meant and indicated their intention to search Appellant's quarters after his denial, Appellant voluntarily produced the marijuana cigarettes in question. This production obviated a physical search which would have been lawful.

Appellant claims, however, that he was coerced into this. I will return to this point in VII, below.

V

Apart from the fact that the "Miranda" rule does not apply to the use of evidence in administrative proceedings, I again find, as I did in Decision on Appeal No. 1779, that interrogation of Appellant in this case, up to the point when the marijuana cigarettes were produced, was not custodial interrogation in the sense of "Miranda" or Escobedo v Illinois (1964), 378 U.S. 478. The questioning of Appellant by the Customs Officers was a proper incident of a "border search." Appellant was not in custody at the time he made his denial of possession of contraband. The fact that he had been told to stay in his room, as he has also been told to stay in the room which he had identified as his, although it was actually unoccupied (see Appellant Brief, p-4), does not indicate arrest or body custody, but only a precaution regarding Appellant's rights, that he might observe the search and be precluded from asserting that in his absence something was "planted" on him. I find nothing in this case to require a distinction to the effect that U.S. v Roussel, supra, does not apply. There was here only a classical example of "border search," and the search proved productive of contraband. When Appellant, under arrest, later

admitted to use of marijuana on the voyage home, he admitted only an act in aggravation of that with which he had been charged, and he admitted it only after a full "Miranda" warning had been given.

V

Still on Appellant's first point, I perceive another subpoint, to the effect that whatever Appellant said or did, his action in producing the marijuana for the Customs officers who had, in conducting their "border search," asked him whether he had any one of several items of contraband, amounted to a "verbal act" such as to constitute his presentation of the marijuana cigarettes:

(1) a statement prohibited from entry into evidence under the "Miranda" decision; and

(2) a statement or act made under coercion of the Customs officials.

It does not appear that Appellant's surrender of his marijuana cigarettes to the Customs searchers was a "verbal act" such as to constitute it a confession or admission improperly obtained. It was an act; it was not verbal; and it occurred, on the sum of the evidence presented to the Examiner, on Appellant's recognition of the fact that he has been "caught" and that he might as well surrender the evidence anyway.

The production of the marijuana was not induced by any admission improperly obtained from Appellant, under any rule of law known to me, but was induced by a knowledge that the Customs officials were about to commence a physical search which would have disclosed the possession of marijuana by Appellant no matter what he did or said. Prior to Appellant's production of the marijuana cigarettes, the searchers had elicited from him no incriminating statements.

VII

The "coercion" asserted by Appellant is an amalgam of the presence of law enforcement officers, the knowledge that one of them was armed, and the instruction to remain in his room where the intended search was to be conducted. The Examiner permitted Appellant to testify out of order. The testimony was to have been limited to the question of the voluntariness of his act in producing the marijuana cigarettes. Appellant testified that he did so because he was "afraid."

Coercion (although the issue is hardly seriously raised on this record) is not the only source of fear. Knowledge of one's

own guilt in the presence of searching law enforcement officers can well produce fear. The Examiner did not err when he rejected Appellant's contention that his action was involuntary.

(A comment is in order here on the procedure followed by the Examiner. While permitting Appellant to testify only as to the nature of his act as voluntary or involuntary, he severely curtailed the Investigating Officer's cross-examination. Later, after the Investigating Officer had rested, the Examiner, on motion of counsel, agreed to accept Appellant's testimony for all purposes on the merits. Although no objection was made, this procedure effectively denied the Investigating Officer the right to full cross-examination.)

VIII

Appellant's second point is that 46 CFR 137.03-3(a) is unconstitutional. He points first to Leary v United States (1969), 395 U.S. 1 in his argument.

The Leary decision has no bearing on proceedings under R.S. 4450 and 46 CFR 137. It holds that the Federal requirement that a transferee of marijuana must apply for a tax payment certificate was unconstitutional in that it compelled a transferee to incriminate himself under the narcotic drug laws of the States. It held also that the presumption created that marijuana found in a person's possession was illegally imported could not be upheld because of the known wild and cultivated growth of marijuana in the United States.

Neither of these holdings has any relevance to a regulation which makes revocation of a seaman's license or document mandatory in an administrative proceeding once the wrongful possession of marijuana is established.

Appellant asserts also that the regulation is "arbitrary, capricious and unreasonable and a denial of due process and equal protection." Appellant claims that the Investigating Officer "agreed with the proposition" and that the Examiner acknowledged that the arguments were "not without merit." Neither of these claims is correct as stated. The Investigating Officer agreed that it might be reasonable to allow examiners discretion in such cases. The Examiner also agreed that this might be a good thing, but suggested that Appellant was in the wrong forum to seek a change in the regulations. Neither agreed that the regulation was unconstitutional.

Appellant overlooks two facts in this argument. One is that in criminal proceedings mandatory sentences after proof of certain

offenses have been long recognized as permissible and the laws requiring them as binding on the sentencing judges. The other is that Examiners in proceedings under 46 CFR 137 act only by delegated authority. Their power to enter orders in narcotics case could have been limited to making only recommended orders. Their power to enter orders in narcotics cases has been limited, as a matter of agency policy, to entering orders of revocation.

I take notice here that there has been an amendment to 46 CFR 137.03(a) which permits examiners to enter orders of less than revocation in marijuana cases when an examiner is persuaded that an experimental use, not likely to be repeated, is involved. Even if such a provision had been effective at the time of this hearing I would be hard put to defend an order of less than revocation in this case.

Appellant admitted that he had, originally, thirty marijuana cigarettes which he had made himself. Sixteen of these he had smoked on the voyage from Saigon to Norfolk. It would require some naivete' to be persuaded that this was an isolated, experimental use of the narcotic, not to be expected to be repeated, when Appellant still held possession of fourteen of the cigarettes even after arrival in the United States. Evidence that Appellant had destroyed what he had left after his "experimental" use might have been persuasive under the proposed new procedure. Evidence that he intended to disposed of the remaining cigarettes without further use might have been worthy of consideration.

The fact is that the fourteen cigarettes were not destroyed, only concealed, when Appellant made his entry declaration. No evidence was offered to the effect that he had any intention to destroy them without further use before they were seized, and that an unexpected seizure, untimely from Appellant's point of view, had frustrated Appellant's intention to dispose of them. A reasonable inference is that he intended to use the rest of his cigarettes. A further reasonable inference is that as of the time of seizure there was a probability that Appellant would, when given the opportunity, use marijuana again. Even under a liberalized policy, there is no reason to believe that an order of revocation would not be reasonable.

One further fact may be noted here. The charge in this case could have been laid under 46 U.S.C 239b, the charge being use of marijuana with the evidence being his admission of use with the corroboratory evidence of possession. Had such a charge been entered and found proved, the Act of Congress would have required an order of revocation anyway.

IX

Appellant's third point is that the order of revocation is unjustified in view of Appellant's "character background and work history." Appellant "was an athlete in high school with above average intelligence and aptitude." It seems to me that Appellant's "character background," which led, the Appellant Brief says, to a U.S. Attorney's declining prosecution of the case (while the brief does not say so, the material furnished in support of it indicates that prosecution was not declined but withheld while Appellant was on a period of voluntarily accepted probation under the supervision of a U.S. District Court), is less persuasive than Appellant thinks. His good background might be worthy of consideration if there were an issue of fact involving use or possession or marijuana raised. His "character background" might be worthy of consideration if it were a question of predicting his future with no other evidence. What has happened here is that Appellant has betrayed his "character background" by his actions. His offense overcomes the consideration to which he might have been entitled under other circumstances.

Appellant's "work history" helps him no more. On his very first voyage as a merchant seaman he became involved with narcotics. It is true that during the pendency of the hearing he served aboard the ships and was apparently not detected in any offenses. (Note that on his first voyage he had escaped detection of many offenses on the voyage from Saigon to Norfolk.) The regulations carefully provide for demonstration of rehabilitation by a narcotics offender. 46 CFR 137.13-1. The period required for the demonstration is three years.

To allow Appellant special consideration for six months' service at sea during the pendency of hearing would deny to others the "equal protection" of the laws which Appellant demands for himself. That Appellant is of good family, is of better that average intelligence, and has impressed persons with his ability is no reason to treat him, in a proceeding under 46 CFR 137, any differently from any other person. Like any other seaman, he will be allowed to apply for issuance of a new document after three years.

ORDERS

The order of the Examiner dated at New York, N.Y., on 19 January 1970, is AFFIRMED.

C.R. BENDER
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 9th day of July 1971.

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